



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 13, 1995

Ms. Betsy Hall Bender
Attorney at Law
P.O. Box 26715
Austin, Texas 78755-0715

OR95-001

Dear Ms. Bender:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29736.

The West Orange-Cove Consolidated Independent School District (the "district"), which you represent, received an open records request for the "reprimand" that the district administered to a particular teacher. You have submitted to this office the following responsive documents:

1. A letter dated September 8, 1994, from the school district superintendent to the teacher;
2. A "Public Reprimand" issued by the district board of trustees on September 21, 1994; and
3. A "Decision" of the board of trustees.

You contend that these disciplinary records come under the protection of sections 552.101, 552.102, 552.103, and 552.114 of the Government Code.

You contend that the disciplinary records come under the protection of section 552.103, the "litigation" exception, because "the teacher in question has indicated that he intends to file litigation over this matter." To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991) at 1.

The mere chance of litigation will not trigger section 552.103(a). *See* Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

In Open Records Decision No. 452, this office concluded that the mere threat of litigation, without more, does not trigger section 552.103(a). However, we need not determine in this instance whether you have met your burden in establishing whether the records at issue pertain to "reasonably anticipated" litigation. Assuming, *arguendo*, that the district may reasonably anticipate a lawsuit, we note that the teacher has had prior access to all of the requested disciplinary records. The purpose of section 552.103(a) is to require parties to litigation to obtain information through the discovery process. Open Records Decision No. 551 (1990) at 3. Absent special circumstances, once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Because the teacher in question has previously seen or had access to his disciplinary records, there is no justification for now withholding such information from the public pursuant to section 552.103(a). Consequently, the district may not withhold these records pursuant to the litigation exception.

We next address your contentions regarding sections 552.101 and 552.102, which, because they protect similar interests, we consider in tandem. Section 552.102(a) protects

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

Section 552.102 is designed to protect public employees' personal privacy. The scope of section 552.102 protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by privacy under section 552.101. To be protected from required disclosure under common-law privacy, the information must contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The information at issue pertains solely to allegations that the teacher in question sexually harassed several of the district's female students while acting as a public servant. As such, the information cannot be deemed to be private or outside the realm of legitimate public interest. Consequently, we conclude that the information may not be withheld under the doctrine of common-law privacy, with the following exception.

See also Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

The information at issue implicates the privacy interests of parties other than the teacher, specifically the various district employees and students who offered detailed testimony regarding the alleged harassment. In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct. Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The *Ellen* court ordered the disclosure of the affidavit of the person accused of sexual harassment and the summary of the investigation with the identities of the victims and witnesses deleted. The court held that the public interest in the matter was sufficiently served by disclosure of such documents and that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.* at 525.

After reviewing the records at issue in light of *Ellen*, this office believes that the "Public Reprimand" constitutes a summary of the allegations against the teacher. Accordingly, the district must release the "Public Reprimand" redacting the identities of the witnesses to¹ and victims of any sexual harassment; however, the names of any witnesses testifying on behalf of the teacher, and thus presumably were not witnesses to any sexual harassment, may not be withheld pursuant to common-law privacy. The more detailed "Decision" document must be withheld in its entirety. The September 8, 1994 letter from the superintendent to the teacher contains no "highly intimate or embarrassing" information protected by common-law privacy and therefore must be released.

You also express concern that the release of these disciplinary records might implicate the teacher's constitutional right to privacy. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 678 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (section 552.101 also embraces constitutional privacy). The constitutional right to privacy consists of two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education and are clearly inapplicable here.

¹We do not believe, however, that the information at issue implicates the privacy interests of school officials who, in their official capacity, have counseled the teacher regarding complaints of sexual harassment or were otherwise generally aware of the allegations without actually being witnesses to such actions. The district may not withhold those individuals' names.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Because the information in the records at issue not otherwise protected by common-law privacy does not concern the most intimate aspects of human affairs, the district may not withhold these records under constitutional privacy.

Finally, we address section 552.114. Section 552.114(a) of the Government Code requires that the district withhold "information in a student record at an educational institution funded wholly or partly by state revenue." Further, section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1).² "Education records" are those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A).

For purposes of FERPA, the teacher's disciplinary records constitute "education records" only to the extent that they contain information about identifiable students. Information must be withheld from required public disclosure pursuant to sections 552.026 and 552.114 only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982); 206 (1978); see also *Kneeland v. National Collegiate Athletic Ass'n*, 650 F. Supp. 1076, 1090 (W.D. Tex. 1986) (educational records are public where personally identifiable information

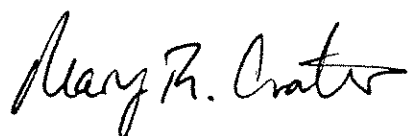
²When a student has attained the age of 18 years or is attending an institution of post-secondary education, the student holds the rights accorded by Congress to inspect these records. 20 U.S.C. § 1232g(d).

is deleted), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988). As discussed above, information identifying students who were witnesses to or victims of the alleged harassment is protected by common-law privacy. The remaining students identified as having testified on behalf of the teacher, and therefore not protected by common-law privacy, must be withheld pursuant to sections 552.026 and 552.114.

In summary, the district must release the "Public Reprimand," deleting any information revealing the identities of testifying district employees and students, and the September 8, 1994 letter from the superintendent. The board of trustees' "Decision" regarding the allegations must be withheld in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/RWP/rho

Ref.: ID# 29736

Enclosures: Marked documents

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(w/o enclosures)